BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ANTHONY WRIGHT Claimant	)	
VS.	)	Docket No. 1,023,343
KNIGHT TRANSPORTATION Self-Insured Respondent	)	

ORDER

Respondent a qualified self-insured requested review of the October 17, 2007 Award by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. The Board heard oral argument on January 23, 2008.

APPEARANCES

Thomas M. Warner, Jr., of Wichita, Kansas, appeared for the claimant. Edwin M. Stoltz, of Overland Park, Kansas, appeared for self-insured respondent (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument, the parties further agreed that there is no longer any dispute over the existence of an accident on November 9, 2004 or that notice and timely written claim of that accident were given and were timely made.[1] The parties further agreed that all the medical bills associated with the accident have been paid. Thus, the Award can be affirmed as to these issues, leaving the nature and extent of claimant's disability as the sole issue for determination.

[1] The issues were originally in dispute before the ALJ but pursuant to the parties' statements at oral argument, that is no longer the case.

ISSUES

The ALJ awarded claimant an 8.5 percent functional impairment to the whole body, a figure that represents an average of the two functional impairment ratings issued by Drs. Murati and Stein. The ALJ further concluded claimant was entitled to a 31 percent work disability based upon a 42 percent task loss and a 20 percent wage loss. In assessing claimant's wage loss, the ALJ utilized claimant's post-injury wages generated from his last period of employment (at the time of the Regular Hearing) rather than calculating the wage loss utilizing the different wages generated by each of the jobs he held since his accident.

Respondent takes issue with these findings and asserts that the Award should be reversed. Respondent first maintains that while claimant may have suffered an accidental injury, he did not suffer any permanent impairment as a result of that injury. And since his accident, claimant remains able to earn a comparable wage and is therefore not entitled to any compensation whatsoever, or alternatively is limited to his alleged functional impairment.

Claimant contends the ALJ's Award should, at a minimum, be affirmed or in the alternative, that his work disability computations should be modified to reflect a higher wage loss at varying points of time, including those periods when claimant was not working at all and sustained a 100 percent wage loss.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was employed as a truck driver assigned to deliver freight in the midwest area. On November 9, 2004, claimant was delivering a load of beer when the load shifted and caused the tractor and trailer to tip on its side.[2] As a result of this, claimant contends he was slammed onto the floor of his truck and alleges he sustained an injury to his neck, back, shoulders and hip.

Claimant was transported by ambulance to the hospital, and after an evaluation he was discharged to a local hotel with pain medications. According to claimant, he was diagnosed with a pulled or strained muscle.[3]

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[2] R.H. Trans. at 11.

[3] *Id.* at 37.

No further treatment was offered by respondent so claimant sought follow-up treatment with his family physician for pain in his back, neck, shoulders and hip.[4] After a preliminary hearing in this matter, Dr. Murati was designated as the treating physician. Dr. Murati offered conservative treatment and eventually claimant was released to return to work.

In late December 2004 early or January 2005, Claimant's employment with respondent was terminated for what respondent called "safety violations".[5] After being terminated the claimant began to look for new employment, and in April of 2005 he was hired by Cornejo & Sons to operate a dump truck. Claimant initially earned $9.00 per hour, and later he received a 25 cent an hour raise. He worked for Cornejo until June 7, 2005, when he was fired. During the 10 weeks he worked for Cornejo, claimant worked 66.25 hours of overtime[6] in addition to his base salary of $370.00. This yields an average weekly wage of $461.96 and when compared to his pre-injury wage of $566.74, yields a 18 percent wage loss.

In June 2005, claimant then went to work for Reddi Industries as an industrial technician performing services such as vacuuming up spills, mud traps, grease traps, oils and different types of nonhazardous waste.[7] While at Reddi Industries claimant earned between $10.50 and $11.50 an hour with only rare periods of overtime. Claimant's average weekly wage was $460 per week, which translates to a 19 percent wage loss.

Claimant was unemployed for a few weeks and then went to work for Price Truck Line for a period of 6-1/2 months, earning $10 per hour although he worked only 35-38 hours per week, thus earning on average $365 per week[8], which translates to a 35.5 percent wage loss. He left that job to take a job with the City of Wichita, beginning November of 2006. There he was employed in the traffic control department and earned between $11.27 and $11.61 per hour. He also worked 32 hours of overtime during the 18.57 weeks he was employed by that entity, leaving him with an average weekly wage for this employer of $494.40, which is a 13 percent wage loss.

Claimant was then offered a job with Sumner County in March of 2007 (where he is presently employed) as part of the utility maintenance crew. This job pays him $11.35

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[4] *Id.* at 15.

[5] *Id.* at 17.

[6] According to his employer, overtime was paid at the rate of $13.50 per hour.

[7] *Id.* at 19.

[8] This figure is from the average number of hours a week (36.5) that the claimant worked for Price Truck Line.

an hour and his employer pays health and life insurance benefits which total $213.51 per week. In the 10 weeks covered by the wage statement, claimant earned an average of $213.85 in overtime each week. His post-injury average weekly wage for this employer is $667.51, a figure that exceeds his pre-injury average weekly wage. Thus, there is no wage loss.

According to these employers, claimant never sought or received any accommodation for any of his purported physical problems, nor did claimant disclose any preexisting limitations. He passed a number of Department of Transportation examinations, took a functional capacities evaluation which indicated he was able to perform heavy work 8 hours per day, and was able to perform all the duties asked of him. At no point did he voluntarily terminate his post-injury employments because of his November 9, 2004 accident. Rather, he was either terminated for unrelated reasons or left because of the prospect of a better job.

Claimant testified that while he has not formally asked for any accommodation at his present position with Sumner County, he maintains that the job, as he performs it, does not exceed his limitations. Other individuals perform those problematic aspects of the job or he asks for help in completing the task(s). This testimony is essentially corroborated by the testimony of his supervisor, Jeffrey Ford, who testified that while claimant was slow when bending, stooping or kneeling, claimant is able to do all aspects of the job, including lifting items, albeit with help from others from the crew.

Dr. Murati treated claimant for a period of time beginning in September 2005 and released him. This treatment was all conservative in nature and included a physical therapy program which claimant did not complete. On August 22, 2006, Dr. Murati met with the claimant for a final evaluation. At that point claimant's complaints included neck pain, mid back pain, occasional right hip pain and low back pain radiating into the legs.[9] Dr. Murati diagnosed right trochanteric bursitis, lumbar sprain and myofascial pain syndrome affecting the cervical spine and thoracic paraspinals.[10] Permanent work restrictions were imposed on August of 23, 2006 of frequent sitting, occasional standing and walking, rare bending, crouching and stooping, occasional climbing stairs and ladders, occasional squatting and crawling, frequent driving, no lifting, carrying, pushing or pulling over 35 pounds, occasionally 35 pounds and frequently 20 pounds, and finally alternate sitting, standing and walking.[11]

Dr. Murati assigned the following impairment ratings: for the myofascial pain affecting the thoracic paraspinals, 5 percent to the whole person in Thoracolumbar DRE

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[9] Murati Depo., Ex. 2 at 1 (Aug. 22, 2006 IME report).

[10] *Id.*, Ex. 2 at 4 (Aug. 22, 2006 IME Report).

[11] *Id.*, Ex. 2 at 5 (Aug. 23, 2006 restrictions on release to return to work form).

Category II, for the myofascial pain affecting the cervical paraspinals 5 percent whole person in the Cervicothoraic DRE Category II, for lumbar sprain 5 percent whole person in the Lumbosacral DRE Category II and for trochanteric bursitis 7 percent to the right lower extremity which converts to 3 percent whole person. He then combined the whole person impairments for a 17 percent whole person impairment.[12] He opined that this was all within reasonable medical probability a direct result from the work-related motor vehicle accident that occurred in November 2004 during claimant's employment with respondent.

After reviewing a task list prepared by Jon Rosell, Dr. Murati opined that the claimant has a task loss of 83.3 percent having lost the ability to perform 25 out 30 previous work tasks.

At respondent's request claimant was examined by Dr. Paul Stein on February 2, 2007. Dr. Stein testified that the claimant complained of pain going down his right hip and discomfort in the upper thigh and pain in the lower thoracic/lumbar region and neck and right trapezius, all of which claimant related to his November 2004 accident.[13] He also noted that claimant said sitting for long periods was uncomfortable and he was able to walk albeit at a slower pace. Dr. Stein opined that the claimant appeared to have sustained some element of soft tissue strain in his accident. But concluded there was no indication of radiculopathy related to the spine in any location and no muscular spasms during the accident. He further noted that claimant's range of motion was good. Ultimately, Dr. Stein felt that the claimant was at maximum medical improvement. Most importantly, he assigned no permanent impairment or restrictions or a task loss as a result of the accident.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[14] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[15]

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is

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[12] *Id.*, Ex. 2 at 4 (Aug. 22, 2006 IME Report).

[13] Stein Depo., Ex. 2 at 2 (Feb. 2, 2007 IME report).

[14] K.S.A. 44-501(a).

[15] K.S.A. 44-508(g).

not bound by medical evidence presented in the case and has a responsibility of making its own determination.[16]

The ALJ averaged the functional impairments rendered by Drs. Murati and Stein and assigned an 8.5 percent permanent partial impairment to the whole body. Obviously, the ALJ was persuaded by the claimant's testimony as to his ongoing physical complaints and found that he had, indeed, sustained permanent injuries in the November 2004 accident.

The Board has considered the entire record and finds this conclusion is supported in the record and should be affirmed. Claimant's physical complaints have been consistent since just after his accident and while he did not have a great deal of treatment, there is no indication that any was required, beyond the conservative method. He continues to do the exercises taught to him during the few physical therapy sessions he attended. The 8.5 percent permanent partial functional impairment is affirmed.

Because claimant's injuries comprise more than a "scheduled" injury as listed in K.S.A. 44-510d, his entitlement to permanent disability benefits is governed by K.S.A. 44-510e(a), which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

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[16] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 (1991).

But that statute has, in the past, been read in light of *Foulk*[17] and *Copeland*.[18] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a), that a worker's post-injury wage should be based upon the ability to earn wages rather than the actual post-injury wages being earned when the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.[19]

The Kansas Court of Appeals in *Watson*[20] more recently held that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker failed to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based upon all the evidence, including expert testimony concerning the worker's retained capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[21]

But even more recently, in *Graham*[22], the Kansas Supreme Court said:

> When a statute is plain and unambiguous, we must give effect to its express language, rather than determine what the law should or should not be. We will not speculate on legislative intent and will not read the statue to add something not

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[17] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[18] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[19] *Id.* at 320.

[20] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

[21] *Id.* at Syl. ¶ 4.

[22] *Graham v. Dokter Trucking*, 284 Kan. 547, 161 P.3d 695 (2007).

> readily found in it. If the statute's language is clear, there is no need to resort to statutory construction. *Steffes v. City of Lawrence*, 284 Kan. [380], Syl. 2, 160 P.3d 843; *Perry v. Board of Franklin County Comm'rs*, 281 Kan. 801, 809, 132 P.3d 1279 (2006).
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> The Court of Appeals erred in overlooking the import of this plain language in the statue, instead attempting to divine legislative intent from a review of legislative history. See *Graham I*, 36 Kan. App. 2d at 525. In our view, that step is unnecessary. Statutory interpretation begins with the language selected by the legislature. If that language is clear, if it is unambiguous, then statutory interpretation ends there as well. See *Perry*, 281 Kan. at 809.
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> The panel began its discussion by equating the statute's use of the phrase "engaging in work" to "able to earn." K.S.A. 44-510e(a) prohibits permanent partial general disability compensation if an employee is "engaging in work" for wages equal to 90 percent or more of the average preinjury wage. The panel said the record was insufficient to support claimant's contention that he was "unable to earn" that amount. We see a distinction with impact between the actual "engaging in work" of the statute and the theoretical "able to earn" of the Court of Appeals. Claimant may be theoretically able to earn more, but substantial evidence supports the Board's determination that his actual pain prevents the theory from becoming a reality.
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> The panel also advanced a policy rationale for its decision --- its desire to avoid manipulation of a system that permitted a work disability award "based purely on reported pain." *Graham I,* 36 Kan. App. 2d at 527. It wanted to avoid a situation where a worker could control "his or her workweek to assure that, *on average*, the postinjury weekly wage will not exceed the 90 percent of preinjury wage that would make the worker ineligible for the award, even through [sic] the worker demonstrates a clear ability to earn the 90 percent any time desired." 36 Kan. App. 2d at 527. There are at least three reasons why this rationale was inappropriate. First, public policy is usually the arena of the legislative branch. Second, even if the judiciary was charged with setting public policy, other mechanisms exist for detection of fraudulent workers compensation claims. See K.S.A. 2006 Supp. 44-501; K.S.A. 44-510e(a); K.S.A. 2006 Supp. 44-551; *Lowmaster v. Modine Mfg. Co*., 25 Kan. App. 2d 215, 219, 962 P.2d 1100, *rev. denied* 265 Kan. 885 (1998). And, third, there is absolutely no evidence in the record that this particular claimant was "faking his pain or lack of ability to work full time."

In *Graham*, the Supreme Court also said that there was no evidence Graham was attempting to manipulate the workers compensation system. Thus, the Supreme Court did

not reach the issue of whether the literal language of K.S.A. 44-510e(a) would be applied to allow an award of a work disability under those facts. Nevertheless, the *Graham* case may signal a willingness on the part of the Supreme Court to revisit those cases where the judiciary decided public policy required the court to depart from the plain language in the statute. The Board, therefore, will continue to follow the *Foulk* and *Copeland* line of cases until an appellate court decides that K.S.A. 44-510e(a) does not require the fact finder to impute a wage based upon a claimant's wage earning ability whenever a claimant fails to prove he or she made a good faith effort to find appropriate employment postinjury.

In this instance, the ALJ concluded that claimant was entitled to a work disability under K.S.A. 44-510e(a) as she found claimant had sustained a task and wage loss that when averaged, exceeded the 8.5 percent functional impairment. In doing so, she implicitly found claimant demonstrated a good faith effort to find postinjury employment. Thus, the ALJ utilized claimant's actual wage loss for purposes of calculating claimant's wage loss. But she elected to use only claimant's last period of employment with Sumner County, employment that began March 27, 2007 and continued up to the date of the Regular Hearing.

Respondent stridently argues that claimant retains capacity to earn a comparable wage and is not entitled to any work disability. For example, claimant's wage at Sumner County, is $11.35 an hour, a weekly wage of $454. In addition to that, he receives $213.51 per week in fringe benefits. Thus, claimant's postinjury average weekly wage ($667.51) exceeds his preinjury wage of $566.74. And because his present wage exceeds his preinjury wage, he is not entitled to a work disability under K.S.A. 44-510e(a). Respondent seems to further argue that these wages, along with his wages at Reddi Industries represent claimant's capacity to earn a comparable wage and that this wage should be imputed to him for all periods when calculating any work disability.

The Board has considered the parties' arguments and the record as a whole and concludes that the ALJ's conclusion that claimant is entitled to work disability benefits should be affirmed. Likewise, the Board concludes the 42 percent task loss (which is an average of the 0 percent and the 83.3 percent) is reasonable under these facts and circumstances and that finding is affirmed.

Turning to the wage loss component of the work disability computation, the Board finds the Award should be affirmed as to claimant's good faith effort to find employment (as there was no contention by respondent that claimant failed to demonstrate a good faith effort to find postinjury employment) but modified to reflect the change in the actual wage loss for each period of time claimant changed employers or was unemployed. For purposes of convenience and consistency, claimant's last wage for each employer is used. Accordingly, claimant's wage and task loss is as follows:

11/09/04-04/04/05:
Unemployed
100 percent wage loss
42 percent task loss
71 percent work disability

04/05/05-06/7/05
Cornejo & Sons
18 percent wage loss ($9.25/hr/40 week; $13.50/hour-66.25 hrs over time over 10 weeks)[23]
42 percent task loss
30 percent work disability

06/8/05-4/20/06
Reddi Industries
19 percent wage loss ($11.50/hr)[24]
42 percent task loss
30.5 percent work disability

04/21/06-05/18/06
Unemployed
100 percent wage loss
42 percent task loss
71 percent work disability

05/19/06-11/19/06
Price Truckline
35.5 percent wage loss ($10 hr/36.5 hrs/week)[25]
42 percent task loss
38.75 percent work disability

11/20/06-03/29/07
City of Wichita
13 percent wage loss ($11.61 hr/40 hr week plus overtime)[26]
42 percent task loss
27.5 percent work disability

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[23] Parham Depo. at 6-7.

[24] Rosell Depo., Ex. 2 at 8.

[25] Claimant's Depo. at 78. The average of the 35-38 hours a week worked by the claimant.

[26] Casey Depo. at 6-7.

03/27/07-current
Sumner County
0 percent wage loss (wage is $667.51 per week)[27]
42 percent task loss
Not entitled to work disability as current wage exceeds preinjury wage.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated October 17, 2007, is affirmed in part and modified in part as follows:

The claimant is entitled to 35.28 weeks of permanent partial disability benefits at the rate of $377.85 per week or $13,330.55 for an 8.5 percent functional impairment; followed by 21.00 weeks of permanent partial disability benefits at the rate of $377.85 per week or $7,934.85 for a 71 percent work disability beginning November 9, 2004 to April 4, 2005.

Beginning April 5, 2005 to June 7, 2005, claimant is entitled to 9.14 weeks of permanent partial disability benefits at the rate of $377.85 per week, or $3,453.55, for a 30 percent work disability.

Beginning June 8, 2005, to April 20, 2006, claimant is entitled to 45.29 weeks of permanent partial disability benefits at the rate of $377.85 per week, or $17,112.83, for a 30.5 percent work disability.

Beginning April 21, 2006 to May 18, 2006, claimant is entitled to 4.00 weeks of permanent partial disability benefits at the rate of $377.85 per week, or $1,511.40, for a 71 percent work disability.

Beginning May 19, 2006, to November 19, 2006, claimant is entitled to 26.43 weeks of permanent partial disability benefits at the rate of $377.85 per week, or $9,986.58, for a 38.75 percent work disability.

Beginning November 20, 2006 to March 29, 2007 claimant is entitled to 18.57 weeks of permanent partial disability benefits at the rate of $377.85 per week, or $7,016.67, for a 27.5 percent work disability.

For the period commencing March 29, 2007, claimant's permanent partial disability ends because his current wage exceeds his preinjury wage and therefore he has no wage loss, and due to the accelerated payout formula in K.S.A. 44-510e, no additional permanent partial disability benefits are payable.

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[27] Shields Depo. at 5-6.

The total award is $60,346.43 which is all due and ordered paid in one lump sum less amounts previously paid.

All other findings and conclusions contained within the ALJ's Award are hereby affirmed to the extent they are not modified herein.

IT IS SO ORDERED.

Dated this _____ day of February, 2008.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Thomas M. Warner,Jr., Attorney for Claimant
Edwin M. Stoltz, Attorney for Self-Insured Respondent
Nelsonna Potts Barnes, Administrative Law Judge